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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

SPACE DATA CORPORATION,  
Plaintiff,  
v.  
ALPHABET INC. and GOOGLE LLC,  
Defendants.

Case No. 16-cv-03260-BLF

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS THIRD  
AMENDED COMPLAINT**

[Re: 159]

Space Data Corporation (“Space Data”) brings this action against Defendants Alphabet Inc. and Google LLC (collectively, “Google”), alleging that Google’s “Project Loon”—a research and development project with the mission of providing wireless services using high-altitude balloons placed in the stratosphere—improperly and unlawfully utilizes Space Data’s confidential information and trade secrets and infringes Space Data’s patents. Third Am. Compl. (“TAC”) ¶¶ 11–16, ECF 144. Space Data asserts four causes of action: (1) patent infringement, under 35 U.S.C. § 1 *et seq.*; (2) misappropriation of trade secrets, under the Defend Trade Secrets Act (“DTSA”), 18 U.S.C. §1836; (3) misappropriation of trade secrets, under the California Uniform Trade Secrets Act (“CUTSA”), Cal. Civ. Code § 3426 *et seq.*; and (4) breach of contract. *See generally id.*

According to the TAC, Space Data develops technology that enables stratospheric communications using floating balloons. *Id.* ¶¶ 5–6. Space Data’s balloons carry radio transceivers, which operate collectively as a high-altitude communications platform. *Id.* ¶¶ 42–47. In late 2007, Google and Space Data discussed Google investing in or acquiring shares or assets of Space Data. *Id.* ¶¶ 74–85, 110. The parties entered into a Mutual Confidentiality and Non-Disclosure Agreement (“NDA”) to facilitate their discussions. *Id.* ¶¶ 16, 83, 151–160. As part of

1 the discussions, Google toured Space Data’s facilities on February 15, 2008. *Id.* ¶ 97. However,  
2 the companies did not ultimately form a partnership. *Id.* ¶ 9.

3 The Court previously granted Google’s motion to dismiss Space Data’s second amended  
4 complaint as to the trade secret claims and the breach of contract claim with leave to amend. *See*  
5 Order 2–4, ECF 142. Although the second amended complaint contained more factual details  
6 relative to the first amended complaint, the Court found that the second amended complaint  
7 remained deficient in pleading how Google’s alleged conduct of trade secret misappropriation is  
8 proscribed by the NDA. *Id.* at 2–3. Space Data has since filed a third amended complaint in an  
9 attempt to remedy the deficiencies identified by the Court. Google again moves to dismiss the  
10 trade secret claims and the breach of contract claim in the third amended complaint. Mot., ECF  
11 159. For the reasons stated on the record and below, the Court DENIES Google’s motion to  
12 dismiss.

### 13 **I. LEGAL STANDARD**

14 To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual  
15 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,  
16 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).  
17 When considering a motion to dismiss, the Court “accept[s] factual allegations in the complaint as  
18 true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek*  
19 *v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

### 20 **II. DISCUSSION**

#### 21 **A. Misappropriation of Trade Secrets**

22 “To state a claim for misappropriation of trade secrets under the [CUTSA], a plaintiff must  
23 allege that: (1) the plaintiff owned a trade secret; (2) the defendant misappropriated the trade  
24 secret; and (3) the defendant’s actions damaged the plaintiff.” *Autodesk, Inc. v. ZWCAD Software*  
25 *Co., Ltd.*, No. 14-1409, 2015 WL 2265479, at \*5 (N.D. Cal. May 13, 2015) (citation omitted).  
26 The elements of misappropriation under the DTSA are similar to those under the CUTSA.  
27 *Compare* 18 U.S.C. § 1839(5), *with* Cal. Civ. Code § 3426.1(b).

28 When previously addressing the second amended complaint, the Court concluded that

1 Space Data sufficiently identified the alleged trade secrets in the complaint. Order 3–4. As  
2 mentioned, however, the Court found that the second amended complaint was deficient in  
3 pleading how Google’s alleged conduct went beyond the provisions in the NDA. *Id.* at 2–3. The  
4 NDA limits Google’s use of Space Data’s confidential information, which is defined in  
5 paragraph 3 of the NDA:

6       3. Information shall only be considered Confidential Information  
7       for the purposes of this Agreement (a) if it is clearly and  
8       conspicuously marked as “confidential” or with a similar  
9       designation; or (b) if it is identified as confidential and/or  
10      proprietary before, during, or promptly after presentation or  
11      communication by Discloser. Information communicated orally  
12      shall only be considered Confidential Information if such  
13      information is designated as being confidential at the time of  
14      disclosure (or promptly thereafter) and is reduced in writing and  
15      confirmed to the Recipient as being Confidential Information within  
16      fifteen (15) days after the initial disclosure.

17      Ex. A to the TAC ¶ 3, ECF 144-1 (“NDA”). The NDA also provides that “Google may use  
18      Residuals for any purpose . . .” and defines “Residuals” to mean “information that is retained in  
19      the unaided memories of Google’s employees or Representatives who have had access to  
20      Confidential Information pursuant to the terms of [the NDA].” *Id.* ¶ 8. Space Data represents that  
21      its TAC sufficiently pleads that the alleged trade secrets were properly preserved as confidential  
22      under the NDA. Opp’n 4–5, ECF 161.

23      Google contends three of the five categories that Space Data asserts as trade secrets—  
24      “hover algorithm,” “thermal management techniques,” and an “altitude control and monitoring  
25      system”—have not been sufficiently alleged so as to make it plausible that those trade secrets were  
26      properly designated as confidential. *See* Mot. 4 n.3. Space Data asserts that Section II.H of the  
27      TAC pleads that the alleged trade secrets were preserved as confidential under the NDA. Opp’n  
28      4–5 (citing TAC ¶¶ 164–177).

29      The Court disagrees with Google. The TAC alleges that Google took photographs of  
30      information relating to “hover algorithm,” “thermal management techniques,” and the “altitude  
31      control and monitoring system.” TAC ¶¶ 171, 173, 175. The TAC also alleges that Space Data  
32      sent an email dated February 19, 2008 designating as confidential “the *photographs* your team  
33      took inside our facilities” and stating “[i]t seems that we discussed quite a bit of information with

1 you as to our technologies and plans for the future and we would like to keep them confidential”  
2 pursuant to paragraph 3 of the NDA. *Id.* ¶¶ 172, 174, 176 (emphasis added). Based on these  
3 assertions, the Court finds that the TAC provides sufficient allegations that make it plausible that  
4 Space Data’s purported trade secrets—“hover algorithm,” “thermal management techniques,” and  
5 the “altitude control and monitoring system”—were preserved as confidential under the NDA.<sup>1</sup>

6 Google further argues that Space Data has not alleged sufficient facts to establish that  
7 Google misused the trade secrets. Mot. 7–11. Specifically, Google asserts that paragraphs 181–  
8 184 in Section II.I (captioned “Google Uses Space Data’s Trade Secrets”) of the TAC are mostly  
9 identical to portions in the second amended complaint and that allegations in two new paragraphs  
10 187–188 are conclusory. Mot. 8–9; Reply 5 n.4, ECF 164. According to Google, Space Data  
11 must allege facts demonstrating similarity between the trade secrets and Google’s balloons but  
12 fails to do so. Reply 7.

13 Space Data counters that numerous allegations, including those in paragraphs 179–188 of  
14 the TAC, show that Google misused Space Data’s trade secrets. Opp’n 5–6. In particular, Space  
15 Data points out that the TAC alleges Project Loon is similar to its trade secrets technology and that  
16 Google engineers took photographs of trade secrets data, where use of such data would not be  
17 covered by the NDA’s Residual clause. *See id.*

18 The Court finds that Space Data pleads a plausible claim that Google has misused Space  
19 Data’s trade secrets. First of all, the TAC alleges that Space Data disclosed its trade secrets to  
20 Google and that the disclosed information was properly preserved as confidential. TAC ¶¶ 164–  
21 177, 180–184. The TAC also alleges that Google took extensive photographs on information  
22 relating to Space Data’s trade secrets. *See, e.g., id.* ¶¶ 105, 107, 116, 126, 132, 164, 172, 174, 187.  
23 According to the TAC, Google’s Project Loon “mirrors” Space Data’s trade secrets technology  
24 and the resemblances could not have occurred without relying on the photographs, which are not

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26 <sup>1</sup> Google does not seriously challenge that the other two categories of alleged trade secrets—“wind data” and “vision slide information”—were not properly preserved as confidential information. In  
27 any case, paragraphs 164, 168, and 177 of the TAC sufficiently alleges that “wind data” and  
28 “vision slide information” were preserved as confidential information under the NDA. The Court  
notes that during oral argument Google represented that Space Data withdrew from asserting  
“vision slide information” as a trade secret. *See* Oral. Arg. Tr. 15:9–11, ECF 175.

1 “unaided memory” covered by the NDA’s Residual clause. *Id.* ¶¶ 187–88. Here, the TAC’s  
2 allegations that that Project Loon mirrors Space Data’s trade secrets are more than bare assertions.  
3 For example, the TAC alleges that Google claimed that it “discovered” information relating to  
4 Space Data’s stratified wind data and the method for sailing balloons in the stratosphere where in  
5 fact the information was learned from Space Data. *Id.* ¶¶ 243–46. Google X’s Astro Teller  
6 allegedly confirmed that Project Loon’s balloons “hover” and work like Space Data’s balloons.  
7 *Id.* ¶ 247. Also, the TAC alleges that Google’s Loon Mission Control “bears a striking similarity”  
8 to Space Data’s Network Operations Control Center (“NOC”). *Id.* ¶ 138. The TAC further asserts  
9 that many aspects of Project Loon and Space Data’s technology are similar, albeit those aspects  
10 may not be directly related to the alleged trade secrets. *See, e.g., id.* ¶¶ 218, 233–42. Accordingly,  
11 the TAC contains factual allegations that Google took extensive photographs of Space Data’s  
12 trade secrets and that there are numerous similarities—some of which are closely related to the  
13 purported trade secrets—between the two companies’ balloon technology. Unlike Google’s  
14 contention, these allegations allow a reasonable inference to be drawn that Google has  
15 incorporated trade secrets obtained from Space Data into Project Loon. Hence, the TAC  
16 sufficiently pleads a plausible claim that Google has misappropriated Space Data’s trade secrets in  
17 a manner not permitted under the NDA. *Iqbal*, 556 U.S. at 678 (“A claim has facial plausibility  
18 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that  
19 the defendant is liable for the misconduct alleged.”).

20 **B. Continuous Use Liability Under DTSA**

21 DTSA was enacted on May 11, 2016 and covers acts occurring “on or after the date of the  
22 enactment of this Act.” Defend Trade Secrets Act of 2016, PL 114-153, May 11, 2016, 130 Stat  
23 376. Google argues that Space Data fails to allege an action of misappropriation under DTSA on  
24 the grounds that the TAC fails to allege a “new or different” act of misappropriation that post-  
25 dates May 11, 2016. Mot. 11–13 (citing *Cave Consulting Grp., Inc. v. Truven Health Analytics, Inc.*,  
26 No. 15-cv-02177, 2017 WL 1436044, at \*4 (N.D. Cal. Apr. 24, 2017)). Space Data responds  
27 that it need not plead a “new or different” act of misappropriation because its DTSA claim is  
28 based on a “use” theory. Opp’n 11–12.

1       When bringing a misappropriation claim under DTSA, a plaintiff may rely on one of three  
2 theories of liability: “(1) acquisition, (2) disclosure, or (3) use.” *Cave Consulting*, 2017 WL  
3 1436044, at \*4. In *Cave Consulting*, the court held that the plaintiff failed to state a claim under  
4 the “disclosure” theory because the complaint failed to allege facts about “whether the information  
5 disclosed was new or somehow different from the prior misappropriation” after DTSA’s May 11,  
6 2016 enactment. *See id.*, at \*5. On the other hand, the court recognized that “[n]othing suggests  
7 that the DTSA forecloses a *use-based* theory simply because the trade secret being used was  
8 misappropriated before the DTSA’s enactment.” *Id.*, at \*4 (emphasis added). Thus, *Cave  
9 Consulting* explained that a DTSA claim based on continuous use after May 11, 2016 does not  
10 require allegations of “new or different” misappropriation, unlike a claim based on disclosure of  
11 trade secrets. Indeed, courts have held that continuous use of misappropriated trade secrets that  
12 began prior to DTSA’s enactment date can give rise to DTSA liability. *See, e.g., Veronica Foods  
13 Co. v. Ecklin*, No. 16-CV-07223, 2017 WL 2806706, at \*13 (N.D. Cal. June 29, 2017); *Brand  
14 Energy & Infrastructure Servs., Inc. v. Irex Contracting Grp.*, No. CV 16-2499, 2017 WL  
15 1105648, at \*4 (E.D. Pa. Mar. 24, 2017).

16       Here, Space Data relies on the “use” theory in asserting its DTSA claim. Thus, Google’s  
17 argument that Space Data must allege a “new or different” act of misappropriation based on *Cave  
18 Consulting*’s application of the “disclosure” theory is incorrect. The Court rejects Google’s  
19 argument and concludes that Space Data can assert a DTSA claim so long as the TAC sufficiently  
20 alleges Google continued to use Space Data’s trade secrets after May 11, 2016.

21       Perhaps recognizing the above weakness in its argument, Google further asserts that Space  
22 Data fails to state a claim even under the “use” theory for lack of specific allegations that Google  
23 has committed misappropriation after the DTSA’s May 11, 2016 enactment date. Reply 8–9.  
24 While disputing the specificity required to allege misuse, Google acknowledged during oral  
25 argument that Space Data’s DTSA claim in one sense “rise[s] and fall[s]” with the CUTSA claim.  
26 Oral Arg. Tr. 19:16–21. Here, the TAC alleges that Google has continued to use Space Data’s  
27 trade secrets when deploying balloons in Australia, Columbia, St. Lucia, Peru, and the United  
28 States after May 11, 2016. TAC ¶¶ 189–204. These allegations and those related to Google’s pre-

1 May 11, 2016 conduct support the reasonable inference that Google continued to misuse the  
2 purported trade secrets after May 11, 2016 upon operating Project Loon. The Court therefore  
3 concludes that the TAC sufficiently alleges a plausible DTSA claim.

4 **C. Breach of Contract Claim**

5 Space Data's breach of contract claim is based on allegations that Google violated the  
6 NDA. *Id.* ¶¶ 312–320. Google does not dispute that the breach of contract claim depends on  
7 Space Data's purported trade secrets misappropriation claims. *See* Reply 10. In other words, if  
8 Google misappropriated Space Data's trade secrets beyond the scope of the NDA, Google would  
9 be in breach of the NDA. As discussed above, the TAC sufficiently pleads that Google has  
10 misappropriated Space Data's trade secrets by alleging Google's conduct that was not permitted  
11 under the NDA. Therefore, the Court concludes that the TAC sufficiently pleads a plausible  
12 breach of contract claim.

13 **III. ORDER**

14 For the foregoing reasons, the Court DENIES Google's motion to dismiss the third  
15 amended complaint as to the trade secrets claims and breach of contract claim.

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17 **IT IS SO ORDERED.**

18  
19 Dated: December 18, 2017

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BETH LABSON FREEMAN  
United States District Judge

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